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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re

MM Docket No. 93-24

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Petition for Reconsideration

¹ Each of the following ITFS licensees in Stockton, California; Santa Fe, New Mexico; San Jose, California and San Francisco, California have been prevented from filing major modification applications in conjunction with marketwide attempts to co-locate facilities:

California State University, Stanislaus: (WGV-750, Stockton; WHR-656 & WGV-751).

Roman Catholic Communications Corporation (WHR-848, Stockton KZB-22, San Francisco; KZB-23 & KZB-25, San Jose).

Association for Continuing Education (WHR-466, San Jose & WHR-760, San Francisco).

San Jose State University (WHR-460, San Jose).

Peralta Community College (WHG-348, San Francisco).

Regents of the University of California (WAC-273, San Francisco, KHU-89, San Francisco & KTTB-97, San Francisco).

Hispanic Information and Telecommunication Network, Inc. (BPLIT-930107DA, Santa, Fe).

The College of Santa Fe (BPLIT-921120DR, Santa, Fe)
Shekinah Network (BPLIT-921015DA, Santa Fe).

Santa Fe Community College (BPLIT-911015DC, Santa Fe).

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clients respectfully requests reconsideration of the June 1, 1995 "correction" to the Federal Register summary of the Report and Order in MM Docket No. 93-24 which, without prior notice, unfairly and improperly changed the effective date of the revised ITFS Rules, and thereby effectuated a retroactive freeze on the filing of ITFS major change applications.³

In its Report and Order, the FCC stated that the new rules would become effective 30 days following the publication of the Federal Register Notice. Report and Order at ¶ 86. However, the Federal Register summary released on April 25, 1995 stated that "the change to the rules adopted in this Report and Order will become effective upon approval by the Office of Management and Budget of a modified FCC Form 330 to effectuate the modifications approved in this Report and Order." 60 Fed Reg. 20241, 20246 (1995). Thereafter in discussions with FCC staff regarding this discrepancy, FCC staff confirmed that effective date would be as set forth in the Federal Register. However, as indicated above, on June 1, 1995, the FCC released a so called "Correction" to the earlier Federal Register summary, changing the effective date for such rules to May 25, 1995, and effectively freezing the submission of ITFS major modification applications as of a date seven days prior to the publication of the correction in Federal Register. 60

² Wireless Holdings, Inc.; MultiMedia Development Corporation and ACS Enterprises, Inc.

³ This petition is timely filed pursuant to Section 1.106 of the Commission's Rules. The correction was published in the Federal Register on June 1, 1995. The thirtieth day following such publication fell on a Holiday. Thus, last day for filing a petition for reconsideration is Monday July 3, 1995.

Fed. Reg. 28546 (June 1, 1995). No notice of this action preceded the publication of that correction.

By virtue of this retroactive correction, each of the above-referenced ITFS licensees was prevented from filing applications essential to specific marketwide co-location projects. Such co-locations are being implemented in the public interest to reduce interference, improve educational service capabilities and promote the development of cable-competitive wireless cable services in the Stockton, San Francisco, San Jose and Santa Fe markets. In each case the complex and interrelated nature of the station co-locations favored the filing of all related applications simultaneously, in order to promote rapid, efficient and coordinated processing by the FCC. However, due to the lack of advanced notice regarding the changed effective date each of these licensees was not only denied the benefits of coordinated filing, but is prevented from filing its ITFS major modification application until such time as the FCC opens a filing window.

Section 553(d) of the Administrative Procedures Act requires that the public be given at least 30 days notice of a change to an administrative agency's substantive rules. 25 U.S.C. § 553. The meaning of this provision as it related to the effective date of an FCC rule was addressed in National Association of Independent Television Producers and Distributors, et al v. FCC, 30 RR 2nd 887 (1974). Therein, the Court of Appeals for the Second circuit stated that the 30 day notice requirement established a minimum notice period but "does not authorize the use of an effective date that is arbitrary or unreasonable." Id at 894. In this case, in violation of APA Section 553, the public was given no advance

notice of the date on which the FCC's ITFS Rules would be changed. In fact, the public was informed that such rules would become effective upon approval of FCC Form 330 by the Office of Management and Budget ("OMB"). Section 552(a)(1)(e) provides that a person cannot be adversely affected by a matter required to be published in the Federal Register unless that person received actual and timely notice. 25 USC § 552(a)(1)(e). It is readily apparent in this case that petitioners were denied such actual and timely notice, to their detriment.

The FCC had advanced no justification or public interest reason for its actions. The arbitrary and capricious change to the effective date of the new rules has substantially prejudiced those who relied on the official and required April 25, 1995 Federal Register publication of the proposed rule change. Despite discussions with FCC staff concerning the timing of the effective date, at no time was the public informed that the Federal Register summary was in any way in need of correction, or that the FCC had any intention of seeking a correction.

The unfairness precipitated by the arbitrary retroactive change in the Rule's effective date has been compounded by subsequent events. On June 21, 1995 the FCC released its Second Order on Reconsideration in General Dockets 90-54 and 80-113, which inter alia proposes to dramatically increase the size of the protected service area afforded each MDS and ITFS station which leases excess capacity to a wireless cable operator. That Rule will most likely take effect prior to the opening of the first ITFS

filing window for major modifications.⁴ If that happens, ITFS licensees who were unfairly prevented from filing major modifications by virtue of the retroactive rule change and freeze, would be required to restudy all co-channel and adjacent-channel ITFS and MDS stations to determine whether interference would be predicted to the newly enlarged protected service area. This could preclude the filing of modifications that were acceptable under the former rules.

Petitioners have already prepared interference studies based on the current rules and in many cases have negotiated interference acceptance agreements or obtained "no objection letters" from affected stations. If petitioners are required to re-study stations based on larger protected service areas, they would be required to negotiate new agreements. In addition, given the significant change in protection afforded to the studied stations under the proposed rules, many of the proposed modifications may no longer be acceptable to the affected stations. Thus, the ultimate impact of the Commission's arbitrary and capricious retroactive change in the effective date of the new ITFS Rules may be to forever block co-location proposals that have already been planned, coordinated, negotiated and prepared for filing.

⁴ The changes to 47 CFR § 21.902(d) are to take effect 60 days following the release of the required Federal Register publication summarizing the proposed Rule change. Second Order on Reconsideration at ¶ 68.

Moreover, the Commission's adoption subsequent to its issuance of the correction, of new rules governing the licensing of Basic Trading Areas for MDS spectrum and its provision for preferences for ITFS spectrum could also be detrimental to the petitioners. Report and Order in MM Docket No. 94-131 released June 30, 1995. ITFS licensees wishing to relocate or make further modifications to their facilities will have the added burden of negotiating with the appropriate auction winner.

In the Second Report on Reconsideration, the Commission recognized that the change in the size of the protected service area could dramatically affect the ability of MDS licensees to modify their existing facilities. Therefore, in order to "ease the transition", the FCC doubled the amount of time ordinarily provided from the release of the Federal Register summary before such rule change would take effect. Second Report on Reconsideration at ¶ 29. This 60 day period will provide MDS licensees planning modifications sufficient time to complete and file such applications prior to the effective date of the new rule. Clearly the FCC has overlooked the fact that this rule will also affect ITFS licensees who are already prevented from filing such modification applications by virtue of the FCC's "correction" of the effective date of the rules governing the ITFS service. Fundamental fairness demands that ITFS applicants, permittees and licensees be afforded at least the same consideration as is apparently being provided to those parties who wish to provide MDS service.

Thus, the petitioners respectfully request that the Commission release a further erratum in MM Docket 93-24, providing for an effective date for the new ITFS rules that coincides with the effective date of the expanded MDS/ITFS protected service area. Wherefore, for the foregoing reasons Petitioners reconsideration request should be granted.

Respectfully submitted,

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July 3, 1995

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CERTIFICATE OF SERVICE

I, Victor Onyeoziri, with Rini & Coran, P.C., do hereby certify that I have this 3rd of July, 1995 caused to be delivered by hand the foregoing "Petition for Reconsideration" to the following:

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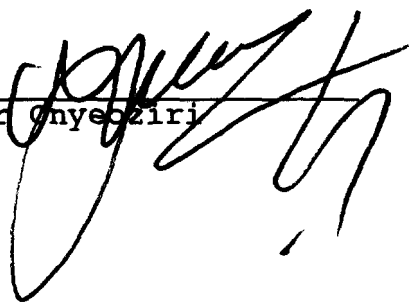
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